Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

IRVING A. GELB,

Petitioner

v.

The New York City Board of Elections, et al

and

The New York State Board of Elections, et al

Respondents

On Petition for Writ Of Certiorari
To The Second Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

IRVING A. GELB, Pro se
8800 Boulevard East
North Bergen, New Jersey 07047
(646) 431-8999

QUESTIONS FOR REVIEW

Introductory Statement

Prior to the September 12, 2000 Democratic Primary for United States Senate, we filed a timely designating petition inorder to appear on the ballot as a candidate. Our petition was challenged and we were removed from the ballot. We wanted to continue as a write-in candidate as was our right under New York Election Law. Because of our earlier experience with the New York City Board of Elections in two previous actions, I knew they would not permit it.

On August 21, 2000 I filed CV 00-4964(RR), in the Eastern District of New York. At that time, the only relief sought was that the Court order the defendants to permit write-in voting in that primary. Counsel opposed our request which was subsequently moved to the Southern District where it was denied. The case became 00 CCiv. 6325(GBD) (DFE).

When appealed the order granting summary judgment in my second action, (Docket No.99-9369), the Second Circuit sent a certified question to the New York State of Appeals. In response to our brief to the N.Y. State Court of Appeals, dated January 4, 2001, (a copy is included in the Appendix for Plaintiff-Appellant at pp. 71-81, submitted with our Appeal) the City Board admitted that their interpretation of the relevant election law had been wrong for over 40 years. They were wrong when I filed my first suit in 1994 (94 Civ. 0013 (SS)). They were wrong when I filed my second suit (97 Civ. 9404 (HB)). And they were certainly wrong when I began my third action.

Questions

1. Should public officials be held accountable for the harm caused by their actions and omissions?

2. In 2000, the New York City Board of Elections (the "City Board") knew that primary petitions for an opportunity to ballot by write-in for statewide office are filed with the New York State Board of Elections (the "State Board"), not with the City Board. The City Board also knew that the State Board did not require an opportunity to ballot petition when there were at least two candidates in a statewide primary. Since there were two candidates on the ballot in the September 12, 2000 Democratic Primary for United States Senate, did the City Board's refusal to permit write-in voting, absent the filing of an opportunity to ballot petition, constitute a § 1983 violation under "color of law?"

3. Did the City Board's refusal to permit write-in voting in the September 12, 2000 Democratic Primary for United States Senate, absent the filing of an opportunity to ballot petition, constitute an ultra vires act?

4. Was the plaintiff denied an opportunity to participate in the September 12, 2000 Democratic Primary for United States Senate as a write-in candidate without due process?

5. Knowing, in 2000, that voters in New York State counties outside of New York City were permitted to vote by write-in in the September 12, 2000 Democratic Primary for United States Senate, did the City Board's refusal to permit write-in voting for the plaintiff in that primary constitute an Equal Protection violation?

6. Since the State Board has repeatedly stated that its interpretation of relevant New York State Election Law was always in agreement with the plaintiff's, and since the State Board has acknowledged its obligation under New York State

Election Law to administer elections for statewide positions, should they have acted to prevented the Equal Protection and Due Process violations caused by the City Board's policy?

7. Did the State Board's insistance that it had no authority to tell the City Board to provide for write-in voting in the September 12, 2000 statewide Democratic Primary for United States Senate constitute a § 1983 violation under "color of law?"

LIST OF PARTIES

All parties **do not** appear on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Board of Elections of the City of New York,
and its Commissioners:
Weyman A. Carey, Michael J. Cilmi,
Terrance O'Connor, Ronald J. D'Angelo,
Douglas A. Kellner,Crystal N. Paris,
Gertrude Strohm, Fredric M. Umane,
Vincent J. Velella and Stephen H. Weiner,
represented by:
Ms Julia Steiner, Senior Corporation Counsel
The City of New York Law Department
100 Church Street, Room 6-185
New York, New York 10007
(212) 788-1051

and

The Board of Elections of the State of New York,
and its Commissioners:
Neil W. Kelleher, Carol Berman,
Evelyn J. Aquila and Helen A. Moses Donohue,
represented by:
Mr. Todd D. Valentine Esq.,
New York State Board of Elections
40 Steuben Street
Albany, New York 12207
(518) 474-6367

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NEW YORK STATE ELECTION LAW	
§ 6-144.	3, 8, 19
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Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53 (1986)	12
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Snowden v. Hughes, 321 U.S. 1,8 (1944)	7
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Williams v. Salerno, 792 F.2d. 323, 326 (2d Cir. 1986)	9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, docket number 05-1269-cv, denying plaintiff's appeal was filed September 25, 2005 and is unpublished but is reprinted in Appendix at pages A1-A5.

The Amended Order from United States District Court Judge Daniels for the Southern District of New York docket number 00Civ.6325(GBD) (DFE), dated January 31, 2005 and is reprinted in the Appendix at pages A55-A58.

The order denying Petitioners' request for rehearing en banc was filed Filed December 8, 2005 and is reprinted in the Appendix, at pages A6-A7.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit denying plaintiff's appeal was filed September 25, 2005. In October 2005, petitioner submitted a timely petition for a rehearing en banc. The petition for a rehearing en banc was denied by order, on December 5, 2005 and filed December 8, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution

Article I Section 4 (1)"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof;..."

Amendment XIV "... No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

-STATUTES-

28 USC Sec. 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Sec. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

NEW YORK STATE CONSTITUTION

Article 1

Sec. 11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof...

NEW YORK STATE ELECTION LAW

§ 6-144. "Nominating and designating petitions and certificates; place for filing." provides (in relevant part):

> Petitions, certificates and minutes specified in this article shall be filed in the office of the Board of Elections of the county, except as follows:for an office or position to be voted for wholly within the city of New York, in the office of the Board of Elections of that city; for an office or position to be voted for in a district greater than one county, or portions of two or more counties, in the office of the state board of elections; for a village office to be filled in a village election not conducted by the board of elections, in the office of the village clerk. ...

Section 6-164, " Primary, uncontested; opportunity to ballot," provides:

> Enrolled members of a party entitled to vote in the nomination of a candidate for public office or the election of a candidate for party position in a primary election of such party, and equal in number to at least the number of signers required to designate a candidate for such office or position may file with the officer or board with whom or which are filed designating petitions for such office or position a petition requesting an opportunity to write in the name of a candidate or candidates, who need not be specified, for such office or position. Upon the receipt of such a petition, such office or position shall be deemed contested and the primary ballots of the party shall afford an opportunity to vote thereon.

STATEMENT OF THE CASE

This action was initiated in August 2000 in the Eastern District as CV 00 4964 (RR). At that time, the only relief sought was an injunction ordering the New York State Board of Elections (the "State Board") and the New York City Board of Elections (the "City Board") to respect my legal right to participate in the September 12, 2000 Democratic Primary for U. S. Senate as a write-in candidate.

In response to motion by the defendants, the case was transferred to the Southern District where injunction was denied. The case became docketed 00 Civ 6325 and was assigned to Judge Daniels. In addition to a correction of the City Board's policy, we now sought damages. Case was dismissed by Judge Daniels in January, 2005. We appealed.

This was my third action against the City Board and